

## COMMENT OF THE NYU SCHOOL OF LAW ART LAW SOCIETY

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### Introduction

The New York University School of Law Art Law Society (NYU Art Law Society) hereby submits this Comment in response to the Copyright Office's Request for Comments regarding the potential enactment of a federal resale royalty right.<sup>1</sup>

The NYU Art Law Society is a student organization whose members are law students committed to the study of art law and interested in pursuing a career in the field. The Art Law Society was launched in the fall of 2011 after branching off from the Intellectual Property and Entertainment Law Society's Arts Committee. Our mission is to provide a forum at NYU Law to discuss cutting-edge art law topics. The current board comprises four third-year and four second-year J.D. students. In addition, there is an active membership of approximately twenty-five other law students pursuing J.D.s and L.L.M.s. Several members have either studied or practiced the arts as well as the law.

As a student organization, the NYU Art Law Society does not represent any individual client or interest group. The Society seeks to raise issues that the Copyright Office should investigate further before moving forward with any recommendation on legislation on a federal resale royalty right. In particular, the NYU Art Law Society seeks to highlight several social policies that the Copyright Act aims to further including providing incentives to produce art and encouraging efficient marketplaces for the sale of works of art.

### Incentives

In order to determine whether a resale royalty right furthers the public interest as a general matter, the Copyright Office should first assess what effects such a right would have on

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<sup>1</sup> This comment has been prepared by a student organization affiliated with New York University School of Law, but does not purport to present the school's institutional views, if any.

incentives to create art. Especially since a resale royalty right may burden the use and dissemination of artistic works in secondary markets, *see* “Markets” *infra*, the Copyright Office should be satisfied that a resale royalty right is likely to incentivize artistic production before recommending that Congress enact legislation. The following paragraphs provide more specific considerations that the Copyright Office should take into account in this inquiry.

As a primary matter, it is important to consider how much incentive we want to put into visual artistic creation. We believe in the importance of increasing incentives generally because of the market’s tendency to deemphasize the value of original works in inspiring new works and furthering cultural development; however, the Copyright Office should consider any proposed copyright policy concerning visual art in light of its overall costs and benefits, and be aware that the marginal private returns to artistic production could at some point equal or surpass the marginal public returns.

The Copyright Office should undertake to assess the income and market expectations of the relevant class of artists. For resale royalty rights to provide an incentive to artists to create art, artists must believe that their artwork will at some point sell for the threshold set by the law to qualify for such a right—under the Equity for Visual Artists Act (EVAA) that amount is \$10,000 at auction. In determining whether artists might believe that their artwork will at some point sell for amounts at or above this threshold, the Copyright Office could consider the data collected by Professor Christopher Buccafusco and Christopher Sprigman.<sup>2</sup> Their studies suggest certain factors to consider, such as the “endowment effect,” according to which artists overvalue their art. Although reaching such a high value may seem daunting for many artists, and in many cases unlikely, given that resale royalties often benefit only a few select artists who experience significant commercial success (in France, for example, seventy percent of proceeds from resale royalties have gone to Picasso, Braque, Matisse and Leger,<sup>3</sup> and in England the biggest beneficiary of resale royalties has been multimillionaire Damien Hirst), using the creativity effect as envisioned by Professors Christopher Buccafusco and Christopher Jon Sprigman, we might still assume that resale royalties could incentivize new artists to create.

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<sup>2</sup> Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011).

<sup>3</sup> Daniel Grant, *A New Kind of Art Royalty*, ARTNET MAGAZINE, <http://www.artnet.com/magazineus/news/grant/grant2-2-07.asp> (last visited Nov. 20, 2012 9:40am).

The creativity effect is an outgrowth of the endowment effect. In its most basic sense, the endowment effect is the idea that individuals place more value on items they already own as opposed to items they may be interested in purchasing. In their article *Valuing Intellectual Property: An Experiment*, Buccafusco and Sprigman performed empirical research applying the endowment effect to intellectual property and found that current owners of intellectual property tend to place about twice as much value on their intellectual property as do interested buyers.<sup>4</sup> Building on that research, Buccafusco and Sprigman then conducted similar experiments comparing the value attributed to a work of art by the artist creating the piece and the value attributed to the same piece of art by its current owner. The results suggest that artists value their works of art twice as highly as the current owners and about four times as highly as interested buyers. Although the research surrounding the creativity effect is in its infancy, it seems that if such a theory accurately reflected the market place, new artists might very well think that their art will sell for \$10,000 or more. In other words, it is not outlandish to assume that if there were a resale royalty right, many new artists would expect—even if not realistically—to reap a benefit from their current work later in their careers. Therefore, assuming visual artists are motivated by potential profits, they may be incentivized to produce art under a new resale royalty right scheme.

This analysis, however, assumes that artists take economic factors into account when deciding to produce art. The Copyright Office should undertake to assess the accuracy of this assumption. Artists may in fact produce art more for personal satisfaction than for monetary benefit, and any incentive effect the resale royalty may have could be blunted for that reason. In fact, other studies conducted by Buccafusco and Sprigman suggest that what artists care about most is attribution, not payment.<sup>5</sup> The Copyright Office should consider having these professors testify in determining what artists most value and whether providing attribution would satisfy artists more than a royalty. If the economic incentive effect does not apply to visual artists, the Copyright Office should reconsider whether an economic justification is the appropriate way to support a resale royalty right. If the justification for a resale royalty right regime is not economic, that would suggest it is morals-based instead.

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<sup>4</sup> Christopher Buccafusco & Christopher Jon Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010-2011).

<sup>5</sup> *Id.*; Christopher Buccafusco & Christopher Jon Sprigman, *Valuing Attribution and Publication in Intellectual Property*, Virginia Law and Economics Research Paper No. 2012-02.

When investigating the motivation of artists, the Office should also examine whether artists tend to be risk-seeking or risk-averse, and have high or low preferences for immediate income. If artists are risk-seeking, have above market expectations of the future value of their works,<sup>6</sup> and have low preferences for immediate income, we may expect them to produce more if a resale royalty right were implemented. However, to the extent artists are risk-averse and have high preferences for immediate income, they will not be as incentivized to create by a resale royalty right. If the Office does find that artists tend to be risk-seeking and have low preferences for immediate income, the Office should then consider whether resale royalties have the potential to over-incentivize artistic creation, and at what point this may become a concern -- for instance, whether artistic creations are flooding the market in a way that ultimately harms artists.

The EVAA presents a wrinkle in the analysis of artists' incentives because the bill, as currently drafted, does not grant the full amount of the resale royalties to those artists whose works fall within the ambit of the proposal. The proposal deducts costs of administering the royalty and then it splits the remaining money between non-profit art museums and the artists. Thus, the final amount of money due to the artist may end up too small to provide an incentive, unless artists are highly risk-seeking and have very low preferences for immediate income, in addition to exaggerating the value of their works.

Under the current proposal, however, the royalties due to museums may nonetheless provide incentives for artists to create through a different channel, as the EVAA shunts the museum royalties to nonprofit museums displaying art by new American artists. The effect of this element of the bill on the incentive theory is two-pronged. First, although the museum royalty provision does divert half of the royalties otherwise benefitting individual artists, it supports emerging artists more immediately by providing a venue for them to display and therefore market their works. The incentive created by the royalty paid directly to the artist is a future incentive for an emerging artist because, in all likelihood, she will not sell art for \$10,000 or more in the first few years of her career. The museum royalty, on the other hand, could provide an increased likelihood of an artist being displayed early in her career and as such is a more immediate benefit. Secondly, it is conceivable—and the Copyright Office should evaluate

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<sup>6</sup> The studies conducted by Buccafusco and Sprigman concerning the creativity effect would tend to support this proposition.

this claim—that contemporary local art displayed in museums increases the number of museum-goers feeling inspired and compelled to create.

At the same time, the administrative costs associated with this distribution plan should be examined in depth as well. While the extra money may incentivize artists and help new artists, there may be costs required to administer the program, keep track of the owners and sale prices, and monitor proper payment—to name only a few concerns.

Finally, in evaluating whether a resale royalty right will provide the right economic incentives, the Office should also consider the position of artists who are legally permitted to include a resale royalty clause in their sale contracts already, but choose not to. Reasons may include a lack of legal savvy, bargaining power, or administration mechanisms, but may also include a market determination that the costs of a royalty outweigh the benefits. If the upfront price is worth more than the resale royalty to the artists, artists would not include such a right in their sale contracts. The presence of competition among artists and art purchasers, the legal savvy of art purchasers, and the low costs of obtaining and sharing information would suggest that it is feasible for the art world as a whole to adopt a resale royalty model on its own. On the other hand, the facts that artists tend not to be legally savvy and that the art market is notoriously secretive may prevent artists and buyers from adopting the model even if it would be beneficial for all parties. In such a case a legislated resale royalty could help secure the relevant benefits.

The Copyright Office should examine why the few artists who possess the requisite resources and bargaining power do not fight to include resale royalty provisions when they sell their art. In such cases, the costs of enforcement via contract action rather than copyright action, or via private society rather than government society, should not diverge for any obvious reason. It seems that the preferences of buyers and artists and element of enforcement costs are already incorporated in the general preference of artists and buyers with near-equal bargaining power not to include resale royalties in their transactions.

### Markets

The art world is known for a notorious lack of information about the art market, complicating not only a resale royalty right's effects on incentives but also its effects on

markets.<sup>7</sup> The Copyright Office itself noted in 1992 that there was not “sufficient current empirical data” that it could use to recommend Congress enact a right.<sup>8</sup> Where information on visual artists and art markets can be obtained, however, the Copyright Office should pursue further information before suggesting that Congress implement a resale royalty right.

One of the main arguments given in favor of resale royalty rights is that visual artists in particular are at a disadvantage compared to other artists (authors, musicians, etc.) in profiting from their own work. Whereas an author may sell multiple copies of her book or a musician may sell multiple copies of a song and thereby obtain royalties, a visual artist only has one copy of a work that she can sell. In determining whether visual artists are in fact at a disadvantage relative to other creators who sell reproductions of their intellectual property, it may be instructive to look at the most recent Census Data to compare annual earnings of different types of artists and creative producers.

The Copyright Office should also conduct further research surrounding the current ability of visual artists to exploit their intellectual property. As presently established, copyright protection for visual art allows the copyright owner to control the market for licensing images of visual art works and for derivative goods such as postcards, posters, magnets, coffee mugs and other items that may be sold in museum gift shops or in other less traditional venues. The Copyright Office should examine whether artworks valued over the \$10,000 threshold suggested in the EVAA are not already exploited in this way. If artists whose works gain value over time are able to exploit derivative markets, then arguably the goal of a resale royalty right has already been met: such artists are already profiting from the popularity of their works. If artists are not able to capitalize on their own success through licensing markets, however, then a resale royalty should be further considered.

As examples, the Copyright Office could look to a range of American visual artists whose works sell for varying amounts. At one extreme, in 2011, auction revenue for Cindy Sherman works was \$13.7 million—a seventy percent raise from revenue for her works in 2010.<sup>9</sup>

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<sup>7</sup> For a detailed look at secrecy in the art market, see Stephanie B. Turner, *The Artist's Resale Royalty Right Overcoming the Information Problem*, 19 U.C.L.A. ENT. L. REV. 329, 350-56 (2012).

<sup>8</sup> Copyright Office Report, *Droit de Suite: The Artist's Resale Royalty* xv (1992).

<sup>9</sup> Katya Kazakina, *Cindy Sherman Market Hits \$13.7 Million Thanks to Sender, MoMA*, BLOOMBERG.COM, <http://www.bloomberg.com/news/2012-02-23/cindy-sherman-market-hits-13-7-million-with-broad-sender-moma-support.html> (last visited Nov. 17, 2012). Cindy Sherman often prints limited editions, with even as few as six prints; as a result, her photographs would fall under the definition

The Copyright Office should look to Sherman's sources of revenue to see how much she is able to capitalize on her popularity without a resale royalty right. For example, she has published several books and sells posters.<sup>10</sup> How much money was she able to obtain by licensing her photographs? Sherman is an extreme example, given that one of her works set the record auction price for a photograph. Comparing her current revenue and what a resale royalty right of seven percent would be, the Copyright Office should consider as well whether there should be a cap on the resale royalty right. At a more modest end of the spectrum, artist Benjamin Edwards's works have sold for amounts ranging from \$2,750 to \$25,000.<sup>11</sup> What opportunities has he had to exploit licensing markets? These are just two suggestions of artists to examine. A more comprehensive study of contemporary American artists should be run. The Copyright Office may also look to efforts such as the Getty Images/Flickr collaboration that allows easy licensing of amateur photography, something that visual artists might do as well, to see what kind of licensing opportunities exist.<sup>12</sup>

Another relevant question in considering the impact of a resale royalty right is the average number of times a work of art is sold over the course of an artist's life. Collectors may buy works and hold on to them for generations while the work appreciates in value, only to sell the work after the artist dies. If an artwork is not sold often during an artist's life, then a resale royalty right may accomplish little. If a work sells multiple times, an artist may end up with a windfall. This inquiry also begs the question of what collectors' motivations for buying art are. Is it because collectors like the aesthetics of a work or because they are making a wise investment decision? How would a resale royalty right affect these motivations and change buyers' habits?

Additionally, the Copyright Office should take into consideration that art tends to lose value after a peak sale. Indeed, very few pieces of art sold for a significant amount are ever resold for a profit. As currently written, however, the EVAA does not account for an owner who sells a work of visual art at a loss, but still at a price above \$10,000. Even though the seller loses

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for "work of visual art" under 17 U.S.C. § 101. See Sarah P. Hanson, *Art Dossier: Cindy Sherman*, ARTINFO.COM (Feb. 21, 2012), <http://www.artinfo.com/news/story/760702/artist-dossier-cindy-sherman>.

<sup>10</sup> See, e.g., EVA RESPINI, JOHANNA BURTUN, CINDY SHERMAN, & JOHN WALTERS, *CINDY SHERMAN* (2012); CINDY SHERMAN, MAIK SCHLÜTER, & ISABEL GRAW, *CINDY SHERMAN: CLOWNS* (2004).

<sup>11</sup> *Blouin Art Sales Index*, ARTINFO.COM, <http://artsalesindex.artinfo.com/asi/results.action;jsessionid=B1603974BAEC05C56499F99B170CA4C8> (last visited Nov. 17, 2012).

<sup>12</sup> Flickr: Getty, FLICKER.COM, <http://www.flickr.com/gettyimages> (last visited Nov. 24, 2012).

money in the sale, the artist still gets a cut of the profit. The Copyright Office should question how it will affect markets to pay an artist based on peaks of value and not have them bear the losses.

Furthermore, the Copyright Office should take into account the fact that a resale royalty right would create a new exception to traditional United States property rights beyond those that were instituted by the Visual Artists Right Act of 1990 (VARA). VARA took away certain property owners' rights to do as they please with visual works of art that they own; a resale royalty right will limit an owner's ability to sell or otherwise dispose of physical property freely. By creating a carve-out to the first sale doctrine, resale royalty rights may impact buying habits, and secondary markets as well. Before supporting a resale royalty right, the Copyright Office should conduct sufficient research to be able to predict how the law is likely to affect property owners' rights and in turn the markets for those works. Some questions the Copyright Office should consider in studying the impact to secondary markets are: (1) what will the impact be on the efficiency of markets?; (2) will a resale royalty right hinder free-flowing trade in art?; and (3) do any incentive benefits accrued by a resale royalty right outweigh any costs to the social benefits of secondary markets?

To understand the impact on the efficiency of markets, it is important for the Copyright Office to investigate the way the art market currently works. The secrecy that veils most art transactions in the United States may not only hinder the Copyright Office from conducting proper studies to answer all of the questions posed above, but it may also obstruct a resale royalty right from working as intended. Stephanie B. Turner's *The Artist's Resale Royalty Right: Overcoming the Information Problem* discusses how the lack of information about the art market might impede a resale royalty right from functioning.<sup>13</sup> Turner points out that for many of the current resale royalty right regimes to work, there must be access to information, most significantly the fact that an auction sale has occurred.

The art market may also obstruct a resale royalty right from working, as players in the market develop new practices to get around the law. As currently drafted, the EVAA applies only to public auctions. Will the law drive resales to private dealers? The current bill also does

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<sup>13</sup> 9 U.C.L.A. ENT. L. REV. 329, 357-363 ("If parties to art transactions choose to adhere to the norms of the art market (by concealing information) rather than follow the law (by revealing information), then the resale royalty right could be rendered meaningless.").

not apply to sales that occur solely on the Internet. Will auction houses change their practices to conduct sales solely on the Internet? In avoiding the fora where the resale royalty is assessed, the resale royalty right may lead to even more market secrecy.

### Conclusion

This Comment has aimed to provide further questions that the Copyright Office should take into consideration with regard to the proposed resale royalty right. The NYU Art Law Society is of the view that without much more significant research into current markets and behaviors of artists, auction houses, galleries, and other participants in art transactions, it is impossible to predict whether the proposed resale royalty right would effectively and efficiently incentivize artistic creation. Before enacting such a sweeping change to existing property and intellectual property law and doctrine, the Copyright Office should be able to make informed projections about the practical consequences of such an enactment by answering the questions that we have provided above.